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2 UNITED DISTRICT DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----X
5 YEMISI AKINYEMI,

6

PLAINTIFF,

7

-against-

8

9 MICHAEL CHERTOFF, SECRETARY DEPARTMENT
10 OF HOMELAND SECURITY,

11

DEFENDANTS.

12 -----X

13

14 DATE: October 25, 2007

15 TIME: 1:15 p.m.

16

17 EXAMINATION BEFORE TRIAL of the

18 Defendant, MICHAEL CHERTOFF, SECRETARY DEPARTMENT

19 OF HOMELAND SECURITY, by a witness, HERBERT HERTER,

20 taken by the Plaintiff, pursuant to a Court Order

21 and to the Federal Rules of Civil Procedure, held

22 at the office of MICHAEL J. GARCIA, ESQ.,

23 86 Chambers Street, New York, New York 10007,

24 before KATE FRANCOMACARO, a Notary Public of the

25 State of New York.

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A P P E A R A N C E S:

K.C. OKOLI, ESQ.
Attorney for the Plaintiff
330 Seventh Avenue, 15th floor
New York, New York 10001

MICHAEL J. GARCIA, ESQ.
UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRICT
Attorney for the Defendant
86 Chambers Street
New York, New York 10007
BY: JOHN DALTON CLOPPER, ESQ.

ALSO PRESENT:
CYNTHIA J. PREE

* * *

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2 H E R B E R T H E R T E R, called as a witness,
3 having been first duly sworn by a Notary Public of
4 the State of New York, was examined and testified
5 as follows:

6 EXAMINATION BY

7 MR. OKOLI:

8 Q. Please state your name for the record.

9 A. Herbert Herter.

10 Q. Where do you reside?

11 A. My business address is Terminal B, room
12 143, North Liberty International, Newark, New
13 Jersey 07114.

14 Q. Good afternoon. My name a K.C. Okoli.
15 I represent the Plaintiff in this lawsuit and I
16 will be asking you a couple of questions in
17 connection with the lawsuit. What I ask is your
18 best recollection. If I ask you a question and you
19 don't understand it, let me know. I will rephrase
20 the question and ask it in a way that you do
21 understand and I ask that you wait for me to finish
22 my question before you give an answer even if you
23 anticipate what the question is. The reason for
24 that is the reporter can't take down two people
25 speaking at once. I ask you to verbalize your

1 HERTER

2 answers instead of a shake or a nod of the head;
3 again, because she can't take down a shake or a nod
4 of the head and if you answer a question, I will
5 assume that you understood the question. Do you
6 understand?

7 A. Yes.

8 Q. And if you need to take a break, we'll
9 allow to you do so. What is your full name?

10 A. Herbert Herter.

11 Q. And the address that you just gave, is
12 that your work address?

13 A. Yes.

14 Q. Since when have you been working out of
15 that location?

16 A. Since 1992.

17 Q. Who is your employer?

18 A. U.S. Customs and Border Protection.

19 Q. What is your current title?

20 A. Deputy chief officer.

21 Q. When did you become deputy chief
22 officer?

23 A. In September of 2002.

24 Q. What is your place of birth?

25 A. Newark, New Jersey.

1 HERTER

2 Q. And for the record, what's your race?

3 A. Caucasian.

4 Q. What's your highest level of education?

5 A. Completed high school.

6 Q. What year did you complete high school?

7 A. 1974.

8 Q. When did you first become employed by
9 the customs and border protection or its
10 predecessor agency?

11 A. October of 1978.

12 Q. When you were first employed, what was
13 your title?

14 A. Dog handler.

15 Q. And does that mean what it says?

16 A. That means exactly what it says.

17 Q. Just for my identification, could you
18 explain a little bit what that means?

19 A. That means that I utilized a director
20 in the employment of my duties to screen cargo,
21 conveyance, the mail and luggage on aircraft
22 entering the country looking for contraband. There
23 are various different disciplines, explosive,
24 currency and food.

25 Q. How long were you a dog handler? Maybe

1 HERTER

2 MR. OKOLI: I am trying to obviously
3 exhaust his impressions speaking with the other
4 officers.

5 Q. Can you answer the question or do you
6 want the reporter to read back the question to you?

7 A. I truly don't understand what you are
8 after. Can you rephrase it?

9 Q. At the time that he came back, he had
10 no further business with the customs? He had been
11 released by the customs?

12 A. Correct.

13 Q. And then, when he came back, your
14 impression was that he wanted to convince the
15 officers that he was truly married to Ms. Akinyemi;
16 am I correct?

17 A. Yes.

18 Q. And my question then is, did you get a
19 sense from your officers as to why he wanted to
20 convince them of his marital status with
21 Ms. Akinyemi?

22 A. My sense from my officers as to why he
23 wanted do it -- I did get the sense from my
24 officers that he was attempting to do it.

25 Q. And did he tell you what they did as a

1 HERTER

2 result of -- can you tell us further what else they
3 told you in the course of this --

4 A. I don't recall the exact verbiage as to
5 the description, but Officer Akinyemi did come back
6 to the area, she openly made contact with the two
7 officers, I believe making mention that she
8 recognized them, then they went on to kiss. My
9 officers said that they did feel uncomfortable at
10 this and they thought it was a little
11 unprofessional as there were other passengers in
12 the area, for an uniformed officer to go into an
13 embrace and a very -- I can't think of the word --
14 and kiss the officer, but not a usual kiss on the
15 cheek or something like that. They were very
16 involved.

17 Q. When you say very involved, can you be
18 more explicit?

19 A. Very strong kissing, overly
20 affectionate, those types of things. Something
21 that they felt appeared to be kind of
22 unprofessional with other passengers around. There
23 was also an exchange of money. I don't recall how
24 much. I don't even recall -- that may have been
25 part of his excuse to come off the aircraft. I

1 HERTER

2 described to me was they used the words they felt
3 uncomfortable which made me feel it was excessive.

4 Q. They made the determination that it was
5 excessive, correct?

6 A. Yes, that's what they relayed to me.

7 Q. This kiss was a kiss on the mouth,
8 correct?

9 A. As far as I understood.

10 Q. As we sit here today, do you find
11 anything wrong with a husband kissing a wife on the
12 mouth in a public place?

13 A. There are levels to that.

14 Q. Where would you draw the line to that?

15 A. That's speculative.

16 Q. I am asking you?

17 A. I don't know exactly where I would draw
18 the line.

19 Q. Did you believe that from what your
20 officers told you, did you believe that -- I will
21 tell you the name of the passenger for this
22 purpose. We'll call him Mr. Seweje -- did you
23 believe that Mr. Seweje felt that he needed to
24 prove that he was married to Ms. Akinyemi to your
25 officers?

1 HERTER

2 manager regarding why Mr. Seweje was brought back
3 on the jet way?

4 A. There came a time where Officer Jurczak
5 made me aware that he had some dialogue with
6 airline personnel. I don't recall him saying the
7 station manager.

8 Q. In that conversation, did Mr. Jurczak
9 tell you that Mr. Seweje was already boarded before
10 he was brought off the jet way?

11 A. They told me that evening that he was
12 already on the plane.

13 Q. Did either Ms. Long or Mr. Jurczak tell
14 you that the actions of Ms. Akinyemi and Mr. Seweje
15 were theatrical?

16 A. I don't at this point recall that word
17 actually being utilized.

18 Q. Did you get the sense from what they
19 related to you that the action was theatrical?

20 A. I had a sense of that, yes.

21 Q. Did you believe that there was more to
22 what was going on than Mr. Seweje coming out to
23 give some money to the wife?

24 A. At that point, I had some questions as
25 to why this incident took place so, I felt there

1 HERTER

2 Q. What is the connection? I guess I'm a
3 little at a loss here. If you can explain that to
4 me, what was in your mind about what happened that
5 evening and the possible immigration status of
6 Mr. Seweje?

7 A. If Mr. Seweje was not here under legal
8 immigration processing and Officer Akinyemi was
9 involved, then I could have a potential issue.

10 Q. In your experience working with the
11 customs, how many times have you come across
12 somebody with a legal immigration problem who would
13 be let go onto the aircraft and come back and put
14 themselves in the hands of law enforcement?

15 A. I can't give you an exact number, but
16 it does happen and has happened.

17 Q. You have known a situation where
18 somebody who had an immigration problem was not
19 discovered by the customs, by the immigration to be
20 in an unlawful status and was on the way out and
21 came right back into the hands of law enforcement?

22 A. Yes, I do.

23 Q. How many times have you come across
24 those circumstances?

25 A. I can't give you an exact number. It

1 HERTER

2 passenger?

3 A. They didn't specifically come out and
4 say that during the course of questioning and
5 looking into it, it became relevant where I
6 determined he was from. I don't recall.

7 Q. Do you recall whether you learned that
8 he was a Nigerian passenger on December 5th?

9 A. I don't recall.

10 Q. Do you recall whether you learned that
11 he was black on December 5th?

12 A. I don't recall.

13 Q. Do you recall whether you learned that
14 the officer, even though they didn't know the name
15 at the time, that Ms. Akinyemi was black on
16 December 5th?

17 A. I can't say I recall.

18 Q. At the time that you asked that
19 Mr. Seweje's immigration status be checked, did you
20 believe that he was in fact married to
21 Ms. Akinyemi?

22 A. I made no determination either way at
23 that time.

24 Q. Since you had made no determination, it
25 means that -- is it fair to say that you did not

1 HERTER

2 take Ms. Akinyemi's word for it that she was in
3 fact married to Mr. Seweje?

4 A. I don't feel that taking her word for
5 it is a fair assessment. There were
6 inconsistencies in the situation that raised
7 questions in my mind.

8 Q. Tell me the inconsistencies that you
9 remembered?

10 A. There were some inconsistencies as to
11 contact addresses that the passenger gave and,
12 again, going back to the statements of my officers
13 at the time.

14 Q. When you say inconsistencies in contact
15 addresses, are you saying that Mr. Seweje gave more
16 than one contact address?

17 A. Yes.

18 Q. Which contact address did he give?

19 A. I don't recall the specifics. He gave
20 a contact address in New York, either Brooklyn or
21 Queens, and one in New Jersey.

22 Q. At what point did he give these contact
23 addresses?

24 A. To the officers when doing their
25 interview.

1 HERTER

2 Q. Which officers told you that he gave
3 them more than one contact address?

4 A. I would say Jurczak, but I am not
5 completely sure.

6 Q. On the day of the interview, your
7 recollection is that on the day of the interview or
8 examination, Mr. Seweje, he gave two different
9 contact addresses for himself to your officers?

10 A. That's what I recall.

11 Q. And did your officers question him
12 about the inconsistencies in the two contact
13 addresses that he gave them?

14 A. I don't have specifics as to their
15 interview.

16 Q. But do you recall them telling you
17 about questioning you about inconsistencies in the
18 address that he gave them?

19 A. I don't recall them specifically at
20 that time saying that.

21 Q. Did you attempt on that day to
22 ascertain any information on Ms. Akinyemi yourself?

23 A. Yes, I did.

24 Q. What did you do?

25 A. I attempted to find out first of all if

1 HERTER

2 she was assigned to the airport that evening. I
3 attempted to find out what her normal duty
4 location, what her normal hours of duty were and I
5 also entered in that data. I received some
6 personal information of the employees. It's in the
7 same database.

8 Q. When you say personal information, what
9 would that be?

10 A. Lists, various items, both historical
11 and personnel in reference to the individual
12 officers. Things like addresses, dates of birth,
13 emergency contact information, those types of
14 things.

15 Q. Was there anything that you found --
16 first of all, did you do this on December 5th or on
17 some other day, what you just testified to?

18 A. I really do believe I did it on
19 December 5th.

20 Q. And did there come a time when you made
21 contact with Mr. Rivera on this matter?

22 A. Yes.

23 Q. What was the first contact that you
24 made with Mr. Rivera in connection with this
25 matter?

1 HERTER

2 A. I believe it was on the 5th, but, if
3 not, it was probably first thing the next morning.

4 Q. Now, you said you were watch commander
5 on the 5th, correct?

6 A. Yes.

7 Q. And that would make you the highest
8 ranking customs personnel at the airport that day?

9 A. Yes.

10 Q. Where was Mr. Rivera when you made
11 contact with him?

12 A. Off duty.

13 Q. On the 5th?

14 A. At that time.

15 Q. How did you initiate this contact?

16 A. I more than likely called him.

17 Q. And what was the purpose of your making
18 contact with him on the 5th?

19 A. He is the manager of the airport
20 operations branch and I wanted to make him aware of
21 the issue at this point in time.

22 Q. What was the issue that specifically
23 caused you to make contact with Mr. Rivera at that
24 point?

25 A. The culmination of the exchange in the

1 HERTER

2 jet way, Officer Akinyemi's involvement and her
3 presence at the jet way.

4 Q. Was there anything that you found when
5 you looked into Ms. Akinyemi's information that was
6 relevant about what you were looking for at the
7 time?

8 A. One item that I found, if I would say
9 it was of relevance, it may have been of relevance,
10 but it did not answer a question for me is that her
11 emergency contact information did not list
12 Mr. Seweje as her emergency contact being her
13 husband.

14 Q. Is it your understanding that people,
15 that everybody gives their husband as their
16 emergency contact?

17 A. No, it's not to my knowledge that
18 everybody gives their husband as an emergency
19 contact and there is no requirement to my
20 recollection that there is. However, this was, in
21 my opinion, another question that was building on
22 my question as to their marital status.

23 Q. Were you able to determine at all from
24 -- I take it that this was something you were
25 doing electronically in a computer?

1 HERTER

2 A. Yes.

3 Q. Were you able to determine from
4 whatever computer program you were looking at
5 whether Ms. Akinyemi was married or not?

6 A. I did not recall seeing it. I don't
7 recall seeing her marital status.

8 Q. As you sit here today, do you know if
9 Ms. Akinyemi was married as of December 2005?

10 A. I don't know.

11 Q. So you were not able to determine if in
12 fact Ms. Akinyemi was married or not at the time
13 that you were looking at this information?

14 A. Yes.

15 Q. So, if you could not determine if she
16 was married, you could not determine who she was
17 married to, correct?

18 A. Correct.

19 Q. Did you have any concern on the 5th
20 about Ms. Akinyemi's marital status at the time?

21 MR. CLOPPER: Objection. Asked and
22 answered. You can answer to the best of your
23 ability.

24 A. Ms. Akinyemi's marital status, not
25 knowing if she was married to the passenger or not,

1 HERTER

2 is irrelevant. My concern was the marital status
3 of the non-U.S. Citizen, the passenger.

4 Q. Were you concerned about the marital
5 status of Mr. Seweje?

6 A. Yes.

7 Q. And you were also concerned about his
8 immigration status?

9 A. Not concerned. I wanted to insure that
10 it was proper.

11 Q. Did you ask Mr. Jurczak to look into
12 the marital status of Mr. Seweje?

13 A. That's all part of the confirmation of
14 somebody having legal status.

15 Q. Did you make a determination as to the
16 marital status of Mr. Seweje?

17 A. Mr. Jurczak advised me that his
18 immigration status appeared at that time to be
19 proper.

20 Q. And you don't remember, even though you
21 were asked for the marital status also to be
22 checked, you don't remember if Mr. Jurczak advised
23 you as to the marital status of Mr. Seweje?

24 A. I was concerned as to the marital
25 status, if that was the condition that he used to

1 HERTER

2 get legal immigration status in the United States
3 and, if that was not the issue, then the concern
4 is, was he here legally in the United States which
5 Officer Jurczak confirmed, so my question was to
6 him, to Officer Jurczak, is Mr. Seweje here as a
7 legal resident and that was answered.

8 Q. Do you believe that people can only be
9 legal residents here only through marriage?

10 A. No.

11 Q. Why was it of importance to you as to
12 Mr. Seweje's legal residence? Couldn't you have
13 determined his immigration status without reference
14 to his marital status?

15 A. If his marital status was part of his
16 immigration process and if it was not accurate and
17 it involved a customs officer then again, I have a
18 potential integrity issue which I am obligated to
19 follow up on and, as a manager, if I so much as
20 feel that I have a question as to a possible
21 integrity issue, it's my obligation to look into
22 that in either direction. If it becomes a
23 non-issue, it's a non-issue. If it becomes an
24 issue, it's my responsibility to pass it forward,
25 that in my mind there were some questions as to the

1 HERTER

2 A. I don't understand what you are getting
3 at with your question.

4 Q. It's not so much what I am are getting
5 at. It's what I am saying. As you sit here, are
6 customs officers who are on break considered to be
7 off-duty during the time that they are on break?

8 A. There are several fashions of breaks.
9 There are intermediate breaks or bathroom breaks
10 which they are still on duty. We do not have a
11 non-paid lunch hour so if they are given their 20
12 to 30-minute lunch break, no, they are not off the
13 clock. So, yes, they are still on duty.

14 Q. Is there any break that they take where
15 they are off the clock?

16 A. Not unless they take leave.

17 Q. As you sit here today, do you know
18 whether an officer who is off-duty can get
19 permission to go meet with a family member at a
20 departure gate at the airport?

21 A. Any individual, not even specifically
22 an officer, may get permission to go down to the
23 departure gate which is granted by the airline, not
24 customs, and those are for extenuating
25 circumstances, generally to assist a minor,

1 HERTER

2 Q. Yes.

3 A. No, I am not aware of any.

4 Q. Are you aware of any CPB officers who
5 have gained access to a restricted area in an
6 outbound area when they were off-duty?

7 A. Not specifically, no.

8 Q. Are you aware of any CPB officers who
9 were terminated solely for having access to a
10 restricted area of the airport?

11 A. I am not privy to the information of
12 why any CPB officers are terminated, the reasons of
13 their termination, so I would have to say, no.

14 Q. At what point did you become aware of
15 Mr. Seweje's national origin?

16 A. I don't recall the specific place or
17 time.

18 Q. Other than the conversation that you
19 had with Officers Long and Jurczak, did you obtain
20 any written statements from them?

21 A. Yes, I did.

22 MR. CLOPPER: Let's take a five minute
23 bathroom break, if you don't mind.

24 (Whereupon, a short recess was taken.)

25 Q. Other than Ms. Akinyemi, since you

1 HERTER

2 became a customs officer, do you know of any
3 customs or CPB officers who gained unauthorized
4 access to a restricted area?

5 A. No specific knowledge.

6 Q. Have you ever heard of any CPB officer
7 gaining unauthorized access to a restricted airport
8 area other than Ms. Akinyemi?

9 A. I don't recall hearing.

10 Q. Is it your testimony that the only CPB
11 officer that you are aware of, as you sit here
12 today, who ever gained unauthorized access to a
13 restricted area is Ms. Akinyemi?

14 MR. CLOPPER: Objection.

15 A. I am aware of Ms. Akinyemi because I
16 was directly involved.

17 Q. Are you aware of any other incident,
18 whether involved or indirectly involved?

19 A. I don't recall hearing of any other
20 incidents and I am not aware of any.

21 Q. In your position as a supervisor, have
22 you ever had to refer the matter concerning any
23 employee to the office of professional
24 responsibility?

25 A. Yes.

1 HERTER

2 Q. How many times?

3 A. One.

4 Q. And what would that occasion be?

5 A. As a supervisory enforcement officer
6 many years ago. I don't recall the exact year. I
7 had an issue of an employee who was out on
8 Workmen's Compensation. His claim was that he
9 could not perform his duties as a dog handler.
10 However, information was relayed to me that while
11 he was off on a Department of Labor status, he was
12 performing personal dog training.

13 Q. You were able to determine that he was
14 in fact performing personal dog training?

15 A. Yes.

16 Q. And that would be fraud on his
17 employer, correct?

18 A. It's fraud as far as I understand
19 against the Department of Labor.

20 Q. And in Ms. Akinyemi's case, would you
21 say there was fraud on her part of what you
22 believed happened?

23 MR. CLOPPER: Objection.

24 MR. OKOLI: No speaking objections.

25 Q. Go ahead and answer?

1 HERTER

2 A. Fraud in her actions?

3 Q. The incident that you relayed
4 concerning Ms. Akinyemi, I am not talking about her
5 husband. Ms. Akinyemi, everything that you
6 relayed, either that your officers told you or that
7 you were able to find out, was there any fraud in
8 any of the actions that Ms. Akinyemi took?

9 A. I can't answer to the specifics of some
10 of the information because it's information that I
11 am not privy to as far as her actions that day and
12 coming to the jet way. No, that was not fraud.
13 That was violation of policy.

14 Q. Was Ms. Akinyemi's situation referred
15 to the Office of Professional Responsibility?

16 A. For her actions that day?

17 Q. Yes.

18 A. Not because of her gaining access to
19 the outbound area, no.

20 Q. Are you aware of her matter being
21 referred to the Office of Professional
22 Responsibility for any reason?

23 A. I am aware of my contact with them?

24 Q. Why was Ms. Akinyemi's situation
25 referred to the Office of Professional

1 HERTER

2 Responsibility?

3 A. I am not at liberty to give specifics
4 to that.

5 Q. Why do you say you're not at liberty to
6 give specifics to that?

7 MR. CLOPPER: Objection. He is thinking
8 about invoking a law enforcement privilege. Let's
9 step outside for a second.

10 (Whereupon, a short recess was taken.)

11 MR. CLOPPER: Objection on the grounds
12 of law enforcement privilege and I direct the
13 witness not to answer that question.

14 MR. OKOLI: Mark that for a ruling as
15 well.

16 (Whereupon, the aforementioned
17 documents was marked as Plaintiff's Exhibits 2-4
18 for identification as of this date by the
19 Reporter.)

20 Q. I am placing before you what has been
21 marked as Plaintiff's Exhibit 2 and 3 at this
22 deposition. Take a look at them and tell me if you
23 recognize them as the statement of the officers
24 that worked with you?

25 A. To the best of my recollection, I

1 HERTER

2 A. Yes, sir.

3 Q. Does that describe what occurred on
4 12/6/05?

5 A. Again, to the best of my recollection,
6 I believe so, yes.

7 Q. And the last full paragraph says
8 12/7/05. Do you see that?

9 A. Yes, sir.

10 Q. Does that describe to the best of your
11 ability what occurred on 12/7/05?

12 A. To the best of my recollections, yes.
13 I don't recall the exact language or verbiage used
14 that day.

15 MR. OKOLI: Thank you. Off the record.

16 (Whereupon, an off the record
17 discussion was held.)

18 (Continued on next page to include
19 jurat.)

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